FILED BY CLERK
JAN -5 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. EDGAR TRAVIS CROSS, Appellant.	)	2 CA-CR 2011-0024 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20070625

Honorable Robert Duber, II, Judge

AFFIRMED

Law Offices of Emily Danies
By Emily Danies

Tucson
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 Edgar Cross was convicted after a jury trial of attempted second degree murder. The trial court sentenced him to an enhanced, partially mitigated eight-year prison term. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), in which she avows she has reviewed the record but has found no arguable issue to raise on appeal and

requests that we search the record for fundamental error. Cross has filed a supplemental brief arguing the trial court erred by: (1) failing to order additional tests relevant to his mental state at the time of the offense that were recommended by psychiatrists who had examined him pursuant to his Rule 11, Ariz. R. Crim. P., motion; (2) permitting a detective to "testify as an expert"; (3) giving jury instructions which "left the jurors no room to not come to an agreement"; and (4) permitting the testimony of a witness from Cross's previous trial to be read to the jury.[1]

¶2 Viewed in the light most favorable to sustaining Cross's conviction, we find there was sufficient evidence Cross committed attempted second degree murder. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). In October 2007, after threatening to kill the victim during a physical altercation, Cross fired a handgun at least three times at the victim's truck as the victim drove away, striking the truck once. *See* A.R.S. §§ 13-1001(A), 13-1104(A). And Cross's sentence was within the prescribed statutory range and was imposed lawfully. *See* A.R.S. §§ 13-105(13), 13-704(A),[2] 13-1001(C)(1), 13-1104(C).

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[1]This was Cross's second trial on the second degree murder charge. We vacated his first conviction on appeal due to a defective jury instruction and remanded the case for a new trial, but affirmed his other convictions and sentences as modified. *State v. Cross*, No. 2 CA-CR 2008-0316, ¶¶ 1, 13 (memorandum decision filed Jun. 25, 2009).

[2]The Arizona criminal sentencing code has been renumbered, effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes relevant here, *see id.* § 119, we refer to the current section number rather than that in effect at the time of the offense in this case. *See also* 2005 Ariz. Sess. Laws, ch. 188, § 1 (former § 13-604(I)).

¶3 We turn now to the arguments raised in Cross's supplemental brief. He first asserts the trial court erred in disregarding the recommendations of mental health professionals who evaluated him pursuant to the court's order issued pursuant to Rule 11. Before trial, the court granted Cross's motion for a psychiatric evaluation to determine whether he was competent to stand trial and his mental state at the time of the offense. The court appointed psychologist Dr. Marc Walter and psychiatrist Dr. Barry Morenz to evaluate Cross.

¶4 Walter and Morenz recommended in their reports that Cross undergo additional testing, specifically an electroencephalographic (EEG) test and a magnetic resonance image (MRI), to determine whether, and to what extent, Cross may suffer from a cognitive disorder related to a possible seizure disorder. Both evaluators concluded Cross was competent to stand trial and was not legally insane at the time of the offense, *see* A.R.S. 13-502(A), but Walter stated at an evidentiary hearing that the EEG and MRI results "could" affect his opinion "regarding [Cross's] state of sanity or his state of mind at the time of the offense."[3] The trial court concluded there had not been "a sufficient showing that [Cross] is incompetent nor that he was insane at the time of the commission of the offenses."

¶5 Cross argues the trial court erred in finding there was insufficient evidence he had been insane at the time of the offenses but instead should have ordered the additional testing recommended by the evaluators. Cross did not raise this argument

[3]The other evaluator did not testify at the evidentiary hearing.

below, and we therefore review only for fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). "To establish fundamental error, [a defendant] must show that the error complained of goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id.* ¶ 24.

¶6 We find no error. Cross cites no authority, and we find none, suggesting that a trial court is required to order additional testing based on the possibility that testing could alter an evaluator's conclusion that a defendant is not insane. Notably, Walter concluded his testimony by agreeing that it was "still [his] conclusion that [Cross] was not insane at the time of [the] offense." And Morenz did not state in his report that further testing was required to determine whether Cross was sane at the time of his offense, noting only that further testing could "delineate the extent of [Cross's] cognitive deficits, if he has any at all." To the extent Morenz's and Walter's opinions were in conflict, we defer to the trial court's resolution of that conflict. *See In re Commitment of Frankovitch*, 211 Ariz. 370, ¶ 19, 121 P.3d 1240, 1245 (App. 2005) (trial court in best position to resolve conflicts in medical testimony). Finally, even assuming, the court erred in not ordering the recommended tests sua sponte, Cross has not established that any error was fundamental or prejudicial. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. Particularly in light of his ultimate conclusion Cross was not insane at the time of his crime, Walter's testimony that additional testing "could" change that diagnosis does not suggest that Cross could have raised an insanity defense successfully. Moreover,

nothing in the record suggests Cross could not have obtained the recommended tests independently.

¶7 Cross next argues the trial court erred in allowing a detective to "testify as an expert" regarding whether a dent in the victim's truck's front bumper had been caused by a bullet and about ejection patterns of shell casings from a semiautomatic pistol. He asserts the detective was not sufficiently qualified as an expert to offer such testimony. Because Cross did not object at trial, we again review only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

¶8 We find no such error. The detective testified he was familiar with firearms and "what bullets . . . will do when you discharge a firearm" because he had "grow[n] up around them" and had served in the military. This experience clearly was sufficient to permit the detective to provide the jury his opinion regarding the possible bullet strike on the victim's truck's bumper and the ejection patterns from Cross's handgun. *See* Ariz. R. Evid. 702 (if specialized knowledge "will assist the trier of fact," witness "may testify thereto" if "qualified as an expert by knowledge, skill, experience, training, or education"); *State v. Davolt*, 207 Ariz. 191, ¶ 70, 84 P.3d 456, 475 (2004) ("The test of whether a person is an expert is whether a jury can receive help on a particular subject from the witness."). Any question about the degree of his qualification goes to the weight, not admissibility, of his testimony. *Davolt*, 207 Ariz. 191, ¶ 70, 84 P.3d at 475.

¶9 Cross asserts the trial court's jury instruction that "[a]ll 12 of you must agree on a verdict. All 12 of you must agree on whether the verdict is guilty or not guilty," was improper because it "left the jurors no room to not come to an agreement."

Because Cross did not object below, we review again only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. Our supreme court determined in *State v. Thomas*, 133 Ariz. 533, 539, 652 P.2d 1380, 1386 (1982), that giving an identical instruction was not error because the instruction protects the defendant's right to a unanimous verdict and a "judge need not, by instruction, invite a 'hung jury.'" Accordingly, Cross's argument fails.

¶10 Cross next asserts that the trial court erred in granting the state's motion to permit a now-unavailable witness's testimony from Cross's previous trial to be read to the jury. *See* Ariz. R. Evid. 804(b)(1) (former testimony in criminal action not excluded by hearsay rule); Ariz. R. Crim. P. 19.3(c) (prior recorded testimony admissible if declarant unavailable). He argues the admission of that testimony violated his confrontation rights. *See Crawford v. Washington*, 541 U.S. 36, 38 (2004) (Sixth Amendment guarantees right to confront witnesses). Cross did not raise this argument below, *see Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607, and in any event his argument is without merit. The right to confrontation is satisfied when a witness's testimony from a previous proceeding is admitted if the defendant had the opportunity to cross-examine the witness. *See State v. Lehr*, 227 Ariz. 140, ¶ 33, 254 P.3d 379, 388 (2011). Cross plainly had that opportunity during his first trial.

¶11 As we understand his argument, Cross also contends the state's motion to permit the prior testimony was untimely because it waited until the first day of trial to make its request to read the witness's previous testimony pursuant to Rule 804. Again, Cross did not raise this argument below. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115

P.3d at 607. Nothing in the record suggests the state had notice of the witness's unavailability before that time, and the court deferred ruling on the state's motion until it could determine whether the witness would appear. In any event, Cross identifies no prejudice resulting from the state's purportedly untimely motion. His argument therefore fails. *See id*.

¶12 Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error. Having found none and having determined the claims raised in Cross's supplemental brief are meritless, we affirm Cross's conviction and sentence.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge